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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

JAMES GROH,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in this proceeding on June 30, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin (1a) is reported at 69 Wis. 2d 481, 230 N.W. 2d 745 (1975).

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on June 30, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a trial court's refusal to order the prosecution to disclose written statements concerning the subject matter of critical prosecution witnesses' testimony for use by defense counsel in cross-examination of these witnesses constitutes harmless error.

CONSTITUTIONAL PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

James Groh, hereinafter petitioner, was charged in January of 1970 with battery to a peace officer, a felony violation of Wis. Stat. §940.205 (1971). Petitioner filed certain pretrial motions, including a motion seeking the production of "statements, written or oral, of the arresting officers and any other witnesses of the State." (R. 30).[1] In ruling on the motion, the trial court refused to order the production of "summaries of statements made by the police officers in their memo books and investigative reports" since, in the court's view, the memo books

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[1]References are to pages of the record as filed in the Wisconsin Supreme Court.

and reports were not covered by Wisconsin case law and statutes which establish rules similar to the Jencks Act, 18 U.S.C. §3500. (R. 186). On the first day of trial, the court suggested that in the interest of saving time, the prosecutor provide witnesses' statements earlier than required under Wisconsin law, but again made it clear that the officers' notebooks were not included in this suggestion. (R. 212, 216). This position of the court, *i.e.*, that the police officers' memo books and reports were not producible, was maintained through the hearing on post-conviction motions. (R. 831).

At trial, the prosecution called Leslie Pedersen, the alleged victim of the battery (R. 220-246, 272-289); Officer Donald Pedersen, Leslie's brother, was called by the defense (R. 293-307) and also testified on behalf of the State. (R. 658-674). Both brothers testified that petitioner assaulted Leslie Pedersen; petitioner testified and denied assaulting Leslie Pedersen. This testimony by the Pedersen brothers and petitioner constituted the only evidence concerning the alleged battery.

The memo books and investigative reports of the Pedersen brothers containing their written pretrial statements related to the subject matter of their direct examination and were not produced for defense counsel's use during cross-examination.

The jury deliberated for over seven hours and returned a verdict of guilty. Petitioner was sentenced to two years imprisonment; on reconsideration, this sentence was modified to not more than one year in the Milwaukee County House of Correction.

In his post-conviction motions, petitioner raised the issue which forms the basis for this petition. (R. 76). At the hearing on the post-conviction motions, counsel

for respondent produced and made part of the record for appeal, the memo books and reports of the officers. (R. 947-961). A review of the documents and a comparison of them with the trial testimony of the Pedersen brothers reflects that their testimony varied in certain large areas from that which had been written in their memo books and reports. Donald Pedersen testified that he told Groh he was under arrest (R. 665); however, no mention of this is made in an otherwise detailed memo book entry. Donald Pedersen testified that Groh jumped on Leslie Pedersen after kneeing him (R. 664, 666); however, there is nothing about this alleged incident in the memo book. Leslie Pedersen's memo book is significant because of its brevity. As for his offense reports, there is nothing said concerning his telling Groh that he was under arrest, although he testified to such a statement (R. 226); there is nothing in the reports about Groh raising his hands above his shoulders, although Leslie Pedersen testified to that (R. 226); and there is nothing in the reports about Groh hollering that he had been kicked after he had allegedly kneed Leslie Pedersen, although Pedersen testified to that also (R. 226). The testimony of the Pedersen brothers and their reports and memo books are reproduced in a separately filed appendix to this petition.

REASON FOR GRANTING THE WRIT

The decision of the Wisconsin Supreme Court decides a federal question of substance in a way not in accord with applicable decisions of this Court.

In affirming petitioner's conviction, the Supreme Court of the State of Wisconsin held that the written statements of the critical prosecution witnesses should have been produced; however, the court, upon examination of those records which were before it as part of the record on appeal, held that "a comparison of those re-

ports which contain the statements of the officers with the testimony of the officers reveal (*sic*) no material inconsistencies or variations which would warrant a reversal of the judgment herein." (5a). Petitioner asserts that the refusal of the trial court to order production of the memo books and investigative reports constituted error of constitutional dimension in that it deprived him of due process of law and the right to confrontation as guaranteed by the Fourteenth and Sixth Amendments to the United States Constitution; he further asserts that in the context of the case *sub judice,* the constitutional error was of such substance as to require a reversal of the judgment of conviction.

I. The error committed by the trial court was of constitutional dimension.

The procedure by which petitioner sought production of the prosecution witnesses' prior statements was established in *State v. Richards,* 21 Wis. 2d 62, 124 N.W. 2d 684 (1963), and later codified in Wis. Stat. §971.24 (1971). It is clear from a reading of *Richards* that it is the functional equivalent of 18 U.S.C. §3500. The Wisconsin Supreme Court has recognized that the failure of trial courts to comply with the *Richards* rule may deprive a defendant of his constitutional right to due process of law, *Myers v. State,* 60 Wis. 2d 248, 208 N.W. 2d 311, 319 (1973). Similarly, federal courts have recognized that failure by the government to comply with 18 U.S.C. §3500 may infringe upon a defendant's constitutional right of confrontation. *Krilich v. United States,* 502 F. 2d 680, 682 (7th Cir. 1974), *cert. denied* 420 U.S. 992 (1975).

Implicit in these holdings is that which was made explicit in this Court's holding in *Davis v. Alaska,* 415

U.S. 308 (1974): cross-examination of critical prosecution witnesses is a primary interest secured by the Sixth Amendment to the United States Constitution. 415 U.S. at 315. Clearly, the access of defense counsel to prior written statements of prosecution witnesses, which relate to the witnesses' direct examination bears a crucial relationship to counsel's ability to cross-examine effectively. The statement made by this Court in *Davis* is appropriate here:

> "Petitioner was thus denied the right of effective cross-examination which '"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis,* 384 U.S. 1, 3.' *Smith v. Illinois,* 390 U.S. 129, 131 (1968)." 415 U.S. at 318.

II. The court below erred in holding that the error was harmless.

Petitioner, having established that the error committed by the trial court and conceded by the Wisconsin Supreme Court was of constitutional dimension, asserts further that the error was not harmless and that it in fact requires reversal of the judgment of conviction.

This Court recognized in *Jencks v. United States,* 353 U.S. 657, 667 (1957) that:

> "Flat contradiction between the witness' testimony and the version of the event given in his report is not the only test of inconsistency. The omission from the report of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

These sorts of inconsistencies abound in the instant case. These inconsistencies demonstrate the prosecution wit-

nesses' willingness to embellish their trial testimony as is apparent from a comparison of the testimony with their prior written statements. A jury which had the benefit of such embellishment being illustrated would have found the State's case significantly less persuasive, *cf. Schneble v. Florida,* 405 U.S. 427, 432 (1972); it cannot be said beyond a reasonable doubt that the failure of the trial court to require production of these documents was harmless. *Chapman v. California,* 386 U.S. 18, 24 (1967); see also NOTE, *Harmless Constitutional Error: A Reappraisal,* 8 HARV. L. REV. 814, 820-824 (1970).

The error should be treated in the instant case as it was by this Court in *Clancy v. United States,* 365 U.S. 312, 316 (1961), and *Campbell v. United States,* 373 U.S. 487 (1963). The error was prejudicial to petitioner; it denied him effective cross-examination and, therefore, confrontation of witnesses against him. Reversal of the judgment of conviction is required.

CONCLUSION

The decision of the lower court was not in accordance with this Court's decisions in other cases; for this reason, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES M. SHELLOW
STEPHEN M. GLYNN
222 East Mason Street
Milwaukee, Wisconsin 53202
Attorneys for Petitioner

APPENDIX

OPINION OF THE WISCONSIN SUPREME COURT

APPEAL from a judgment of the circuit court for Milwaukee County: HON. HERBERT J. STEFFES, Circuit Judge. *Affirmed.*

The defendant, James Groh, was convicted of battery to peace officers, Sec. 940.205, Stats., following a jury trial. The defendant was sentenced to two years' imprisonment. On reconsideration, the sentence was modified to not more than one year in the House of Correction of Milwaukee County.

On January 27, 1970, a fight took place in Wally's Tavern located at North 26th Street and W. State Street in Milwaukee, Wisconsin. The principal participants were Officer Leslie Pedersen of the Milwaukee Police Department and James "Crazy Jim" Groh, the defendant. Subsequently, the defendant was charged with battery to a peace officer, Sec. 940.205, Stats. In December, 1971, the defendant made certain pretrial motions, including a demand for ". . . copies of any statements given by any of the State's witnesses or potential witnesses . . ., including any statements, written or oral, of the arresting officers and any other witness of the State."

A jury trial was commenced on February 28, 1972. The state presented two witnesses, Officer Leslie Pedersen and Doctor Sidney Boxer. Officer Pedersen testified that at about 9:45 P.M., while he was on duty, he entered Wally's Tap in an attempt to locate another officer regarding a court matter. Inside the tavern, he saw James Groh and two other men, Royce Hall and Billie Hall,

standing near the bar. Another officer, Donald Pedersen, Leslie Pedersen's brother, was attempting to get Royce Hall to leave the tavern on another matter. Leslie Pedersen testified that the defendant was intervening in that conversation and was telling Hall he did not have to leave if he had already taken care of the matter. Two warnings were given to the defendant by Leslie Pedersen that he should not interfere or he would be subject to arrest. The defendant continued to tell Hall that he did not have to go so a third warning was given. At this, the defendant laughed and Leslie Pedersen told him he was under arrest.

At this time, Leslie Pedersen and the defendant were standing face to face, about one foot apart. The defendant raised his hands above his shoulders and then kneed Leslie Pedersen in the groin and brought his arms down towards the officer. The officer fell back a few feet into a table and the defendant continued towards him.

Other police officers became involved in the struggle and the defendant was finally subdued on the sidewalk outside the tavern. As a result of being kneed, Leslie Pedersen said he felt pain and a black and blue mark developed. He went to see a doctor the next day.

Dr. Boxer testified that he treated Leslie Pedersen on January 29, 1970. The officer complained of pain in certain areas including his left thigh and had a contusion there.

Leslie Pedersen's testimony was corroborated in part by a number of other witnesses called by both the defense and the state on rebuttal.

The defendant and some of his witnesses testified that the police were the aggressors and that the defendant was the one who was kicked and beaten, not Leslie Pedersen.

On March 6, 1973, the jury returned a verdict of guilty. Motions after verdict were made and orally denied.

HANLEY, J. Three issues are presented upon this appeal:

1. Was there error as to compliance with the rule which recognizes the right of a defendant to inspect statements previously made to authorities by witnesses called to testify on behalf of the state?

2. Did the trial court unduly restrict the defense counsel's closing argument?

3. Did the trial court unduly restrict the defendant's cross-examination of Leslie Pedersen?

Production of Statements

The defendant's first contention is that his conviction should be reversed because his trial counsel was not allowed to inspect the daily memorandum books and written reports of Officers Leslie Pedersen and Donald Pedersen. Pre-trial motions included a demand for the state to produce copies of any statements written or oral, of the arresting officers. This contention is based upon this court's decision in *State v. Richards* (1963), 21 Wis. 2d 622, 124 N.W. 2d 684, where it held at p. 633 that:

"We conclude that a defendant in a criminal case is entitled to inspect statements previously made to the authorities by witnesses called to testify on behalf of the state. This right goes only to statements or portions thereof concerning the subject matter of the witness' testimony and written or signed by the witness or given orally and stenographically or mechanically transcribed. As indicated in *State ex rel. Byrne v. Circuit Court, supra,* we see no policy reason to require that inspection be afforded

to the defendant before the witness testifies. But after direct examination of the witness, upon request of the defendant out of the presence of the jury, the court should order the state to produce for inspection all such statements of the witness in any of the forms referred to."

Sec. 971.24, Stats., basically is a restatement of this rule. The statute, however, applies to actions commenced after July 1, 1970. Sec. 967.01, Stats. Because this action was commenced prior to that date, the statute does not apply.

The importance of this rule was recognized in *Myers v. State* (1973), 60 Wis. 2d 248, 263, 208 N.W. 2d 311:

". . . [N]ot to allow the defendant at trial 'access to' and the 'right to use' prior inconsistent statements for 'impeachment purposes' is a violation of his constitutional right to due process of law. . . ."

In that case it was held to be reversible error to deny the defendant the right to use a witness' testimony from a John Doe hearing for impeachment purposes.

The first question which must be answered is whether the "memo books" and reports of these two officers are covered by the *Richards* rule. The state admits that the reports "appear to fall within the *Richards* rule," but argues that the "memo books" do not. We think the books and reports are within the category of producible statements under *Richards*: ". . . statements or portions thereof concerning the subject matter of the witness' testimony and written or signed by the witness . . ." 21 Wis. 2d at p. 633. The memo books and reports were written by the officers; the reports were signed by them. Both officers testified as to the incident preceding defendant's arrest. The statements should have been produced.

However, in *Richards* this court indicated that a violation of the Richards rule would not be prejudicial unless the statements in question ". . . contained such inconsistencies with, or variations from, [the witness'] testimony as would have been useful to counsel in impeaching [the witness'] testimony. . . ." 21 Wis. 2d at p. 634.

Ordinarily, we would reverse the judgment but permit the verdict to stand. Upon remand, the circuit court would cause production of the records in question, and determine at a hearing whether such inconsistencies or variations exist. However, in the instant case, the records in question are before this court and a comparison of those reports which contain the statements of the officers with the testimony of the officers reveal no material inconsistencies or variations which would warrant a reversal of the judgment herein.

Limiting Closing Argument

The second issue raised is whether the trial court unduly restricted defense counsel's closing argument. During the course of the trial, the parties stipulated to the admission into evidence of the hospital records of the defendant from Milwaukee County Emergency Hospital and Milwaukee County General Hospital. Defense counsel wished to argue that the records show that the defendant was taken from the emergency hospital to County General by county ambulance and not by Officer Donald Pedersen. This argument was directed to the credibility of Donald Pedersen. Before his argument, defense counsel was told that he could not argue from the exhibits on that point.

Defense counsel's closing argument is not in the record. Therefore, the question of prejudice is difficult to determine.

The state argues that there is no foundation for the claim that the hospital records contradicted Donald Pedersen's testimony and, therefore, the defendant could not have been prejudiced by the trial court's refusal to allow him to argue from the hospital records.

The argument which defense counsel wished to make to the jury is not supported by the evidence. Officer Leslie Pedersen testified that he knew that the defendant was taken to Milwaukee County General Hospital, but he did not go along to the hospital. Donald Pedersen testified that he conveyed the defendant to County Emergency Hospital at about 10:15 p.m. When called on rebuttal, Donald Pedersen further testified that he could not have gone to a tavern after the incident because he was in personal contact with the defendant and had personal custody of him until 2:15 A.M. Donald Pedersen's partner, Officer Jack Ballering, testified that he took the defendant to the emergency hospital and was at County General Hospital with him, but did not recall how the defendant got there. The hospital records indicate that Donald Pedersen's and Jack Ballering's police vehicle was in fact at Milwaukee County General Hospital.

While Donald Pedersen did testify that he had personal custody and had personal contact with the defendant until he was released from the hospital at 2:15 A.M., he did not testify that he conveyed the defendant there in his vehicle.

Since the defendant's claim that the hospital records contradicted the testimony of Donald Pedersen is without foundation, his claim that he was prejudiced by the

trial court's refusal to allow him to argue from the hospital records has no merit. The refusal to allow such argument is no basis for a reversal of the judgment in this case.

Restriction of Cross-Examination

The defendant argues that he was denied a fair trial by the trial court's sustaining objections to certain questions asked by defense counsel during the cross-examination of Leslie Pedersen. During the cross-examination of this witness, the following occurred:

"Q. Now, officer, did you obtain the names of any of the patrons who witnessed this act inside the tavern?

"A. I personally did not obtain any names.

"Q. Do you know if any other officers attempted to obtain names from any patrons inside?

"A. I can't testify as to what other officers did.

"Q. Did you attempt to obtain the names of any witnesses outside the premises?

"[District Attorney]: Objection, I don't see the materiality of this line of questioning.

"The Court: Sustained.

"[Defense Counsel]:

"Q. Do you know, officer, of any witnesses to this act other than police officers?

"[District Attorney]" Objection, immaterial.

"The Court: Sustained."

The defendant contends that the court's rulings on these two objections unduly restricted his cross-examination of this witness. He further argues that the court's rulings prevented him from gaining access to witnesses.

No offer of proof was made with regard to any testimony thus excluded, however. In *State v. Hoffman* (1973), 58 Wis. 2d 21, 24, 205 N.W. 2d 386, this court said:

"*Cross-examination.* Error is alleged in the trial court's restricting cross-examination of certain state witnesses. Four instances are set forth where the prosecutor objected to a question asked and the trial court sustained the objection. In each instance the defense counsel made no response to the objection, and no offer of proof was made in regard to any testimony thus excluded. An offer of proof is a condition precedent to having this court review an allegedly erroneous ruling on evidence, and here none was made. (*See*: *Deja v. State* (1969), 43 Wis. 2d 488, 492, 168 N.W. 2d 856; *State v. Moffett* (1970), 46 Wis. 2d 164, 168, 174 N.W. 2d 263; *State v. Becker* (1971), 51 Wis. 2d 659, 668, 188 N.W. 2d 449.)"

Where counsel fails to state the purpose of a question to which objection is sustained on grounds of immateriality, it is within the discretion of the trial court to exclude the evidence. *State v. Moffett, supra.*

Because no offer of proof was made and no explanation was given as to why defense counsel thought these questions were material, it lay within the discretion of the trial court to sustain the objection and claim of error by the trial court is without merit.

By the Court: Judgment affirmed.